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No. 821

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

UNITED STATES OF AMERICA, *Petitioner,*

VERSUS

ANGLIN & STEVENSON, *ET AL., Respondents.*

Response to Petition for Writ of Certiorari

JOSEPH C. STONE,
W. T. ANGLIN,
ALFRED STEVENSON,
DICK JONES,
E. W. SMITH,
CHARLES A. MOON,
FRANCIS STEWART,
LEON C. PHILLIPS,
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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 821

UNITED STATES OF AMERICA, *Petitioner,*

vs.

ANGLIN & STEVENSON, *ET AL., Respondents.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Statement.

Supplementing the Petitioner's statement, Respondents call attention to the following facts:

In the original case the United States expressly consented and requested that the court should try all the issues, both main and ancillary, including the issues as to attorneys' fees and the expense of litigation. On July 18, 1938, in their requests for findings and conclusions, Respondents requested the court to find and adjudge

> "that their [the clients'] respective shares in said estate, *excepting such sums as this court may fix or allow as charges thereon because of or in connection with this suit*, should be held by the Secretary of the Interior and disbursed under his supervision for the use and benefit of said distributees * * *." (R. 743.)

On the following day petitioner expressly adopted all the requested findings and conclusions made in behalf of the distributees. The United States, through the District Attorney and his assistants, participated in the preparation of the requested findings and conclusions, and reported the

fact to the Department of Justice (R. 743, 551, 476-7). The court made findings and conclusions substantially as requested (R. 52, *et seq.)*. Paragraph 5 of the judgment in the main case (R. 749) provided that the portions of the estate awarded to each distributee, "*excepting such sum or sums as this court may allow, fix and determine as charges thereon and payable therefrom as costs, expenses and attorneys' fees incurred in connection with this suit,*" should be held by and disbursed under the supervision of the Secretary of the Interior for the use and benefit of the restricted distributees.

In Paragraph 7 of the judgment (R. 750) the court reserved jurisdiction to determine in a subsequent proceeding all incidental or ancillary matters for carrying out the provisions of the judgment.

The United States Attorney, through his assistants, helped to prepare the judgment and joined in asking for its entry, promptly reporting those facts to the Department of Justice (R. 551). The United States was satisfied with the judgment and did not appeal from it. On May 28, 1942, after Respondents had filed their petition for allowance of attorneys' fees and expenses, the United States made its first objection to the court's exercise of its jurisdiction which the government had invoked (R. 19-22).

The court's findings (R. 52, *et seq.)* set forth the facts with respect to the ignorance and helplessness of Respondents' clients, the intelligence of their many adversaries, the skill and ability of opposing counsel, the necessity for the employment of able and experienced attorneys to represent the claimants finally adjudged to be the owners of the properties, the extraordinary hazards involved, the unusual difficulties of the litigation which required the attorneys for the successful claimants to prepare for and try

during the long years of their service some forty-four lawsuits in one, and as to which one of the able attorneys for some of the adversaries testified: "In the beginning and until the court decided it I believed it was anybody's lawsuit; that Jackson Barnett was so old that the witnesses were so hard to find who could testify as to his origin, who in fact his blood relatives were, that it might be anyone's lawsuit until it was determined." (R. 297).

Other important facts are stated hereinafter at places in the brief deemed most convenient for the Court's consideration.

The petition for Writ of Certiorari should be denied because no cause is shown for the issuance of the Writ.

The decision attacked is entirely sound and fully supported by decisions of this Court.

1. The United States filed a petition in the nature of an original bill in its own behalf and in behalf of all parties to this cause who were restricted Indians, and thereby invoked the full and complete equity powers of the court. This is a right the sovereign has exercised always when its relations to its Indian wards are involved or their rights affected. *This sovereign right did not arise from the Act of April 12, 1926; nor does it depend in any measure upon that Act.* In *Heckman* v. *United States*, 224 U. S. 413-448, 56 L. ed. 820, it was held that such representation of Indian wards by the United States is complete; that out of the government's peculiar relations to Indians sprang the obligation to protect them, together with the power to do so; that the government recognizes no limitations which are inconsistent with its discharge of the national duty. To the same effect is an unbroken line of this Court's decisions.

It is well settled that where there is removal of a state court case to the Federal Court, followed by the filing of petition of intervention by the United States upon behalf of its Indian wards, such intervention is in the nature of an *original bill*, with the result that there are no limitations whatsoever upon the court's jurisdiction of the character asserted in the petition for writ of certiorari. *United States* v. *Mid-Continent Petroleum Co.* (C. C. A. 10), 67 F. (2d) 37, certiorari denied, *Hosey* v. *Mid-Continent Petroleum Corp.*, 290 U. S. 702, 54 S. Ct. 346, 78 L. ed. 603.

The case of *United States* v. *Equitable Trust Co.*, 283 U. S. 738, 75 L. ed. 1379, was commenced on January 22, 1925, and decided by this Court June 1, 1931. Jurisdiction to allow attorneys' fees and costs was sustained in circumstances substantially the same as here involved, and wholly without any reference to the Act of April 12, 1926, 44 Stat. 240.

It is entirely clear that the Federal District Court's jurisdiction, arising from the government's own bill, was unaffected by the jurisdictional limitations of either of the state court cases which were consolidated with the government's suit.

The several actions consolidated in one case are *in rem*. *Kline* v. *Burke*, 260 U. S. 226, 67 L. ed. 226. There it was said of such action, "The effect is to draw to the Federal Court the possession or control, actual or potential, of the *res*." The situation is the same as if the Secretary of the Interior, or other governmental agency, had brought all of the property into the district court and placed same in its registry, and had asked that court to try the issues between the various contending claimants, decree to whom the property belonged, and distribute same to the true owners. The United States was stakeholder of the properties. The gov-

ernment alone could furnish and did provide the most suitable forum for determination of the heirs, the distribution of the estate, and all matters incident thereto.

2. Section 3 of the Act of Congress of April 12, 1926, 44 Stat. 240, *enlarged the jurisdiction of federal courts over removed state court cases of this class.* It authorizes the removal of causes coming within the orbit of its provisions, even though other independent grounds for federal jurisdiction are not present. The general removal statute, limiting the Federal Court's jurisdiction to matters pleaded in the state courts, has no application in such case as this. *Caesar* v. *Burgess* (C.C.A. 10), 103 F. (2d) 503; *United States* v. *Fixico* (C.C.A. 10), 115 F. (2d) 389.

The government's theory of limited jurisdiction gives no meaning to the following provisions of the Act. Referring to the federal court's jurisdiction after removal, it is provided, "and such court is hereby given jurisdiction to hear and determine said suit." It is further provided, "and the cause shall then proceed in the same manner as if it had been originally commenced in said district court." And it is further provided that "the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved." The first quoted provision clearly disposes of the contention that the jurisdiction of the district court is limited to the jurisdiction of the courts from which removal was had. The second quoted provision makes it clear that the jurisdiction of the district court is the same as if the removed cases had been commenced in the Federal Court. The third quoted provision removes from this case any question with respect to restrictions against alienation.

In *Caesar* v. *Burgess*, 103 F. (2d) 503-506 (C.C.A. 10), referring to these provisions, it was held that by these pro-

visions the United States yielded its exclusive jurisdiction of its restricted Indian wards to the extent necessary for final disposition of matters of this kind in the Federal District Court.

In *United States* v. *Fixico, supra*, it was held that the jurisdictional provisions of said Section 3 of the Act of April 12, 1926, are broader in scope than those of the general removal statute, and it was stated, "It must be presumed that the Congress chose that broad language with deliberation and studied purpose."

The government's erroneous theory of limited jurisdiction, if sustained and applied, would deprive the Federal District Court of jurisdiction to hear and determine the state district court cases removed to the Federal Court and consolidated with the government's action. Consider, for instance, the McIntosh County district court case. It was to recover and quiet the title to restricted lands left by Barnett, the same having been purchased with restricted funds and made expressly subject to restrictions. Had it not been removed, and had it gone to final judgment in the state district court, the findings and judgment of the state court would have been conclusive as to all the parties to the action (the parties being the same as those in this case), and the findings with respect to the heirship and the rule there established would have operated as conclusive in all subsequent litigation with respect to the same matters that were adjudged in the state court. Everything was done in that case to bind everybody. The heirs and all adverse claimants within the jurisdiction of the court were personally served. Due notice by publication was given to all possible adverse claimants. If it were true, as now claimed by the government, that the Federal District Court had only the limited jurisdiction of a county court, the Federal Court

had no right whatever to adjudge the issues presented in the McIntosh County district court case.

Refutation of the government's theory as to jurisdiction is found in its own pleadings. In fact the record shows that the government's theory of jurisdiction was precisely the same as Respondents' theory until after the original Jackson Barnett case was affirmed by the Circuit Court of Appeals.

3. Recent decisions of this Court, *United States* v. *Equitable Trust Co.*, 283 U. S. 738, 75 L. ed. 1379, and *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 83 L. ed. 1184, fully and clearly settled the jurisdictional question in favor of Respondents. Petitioner erroneously treats this question as still unsettled. This erroneous contention is offered as the sole ground for issuance of the writ.

In the *Equitable Trust Company* case it was shown that Barnett was an incompetent and that he needed help to establish his right to the property. These elements are here in much larger measure. Barnett did have the very active help of the United States. Its attorneys vigorously defended his cause. But in the instant case the government remained neutral and impartial throughout the entire period of the litigation, and this neutrality continued for years after the government's attorneys knew that many of the claims, very difficult to meet, were false and wholly fabricated. This was admitted by the United States in its response to the petition for allowance of attorneys' fees and expenses. In paragraph IV of said response this admission appears thus: "The United States alleges that during the trial of this case, and as a result of investigations made by solicitors, agents, and representatives of the United States, it was discovered that many of the claims presented by claimants herein were unfounded and spurious. The United

States, at all times throughout this litigation, constantly maintained a neutral and impartial position as to the claims of the various claimants." (R. 31). This neutrality prevailed in the case of Bennie Scott, a Mexican who never had the slightest connection, by blood, by record, or otherwise, with any Indian tribe. The government prosecuted him successfully and had him sent to a federal penitentiary because of his criminal effort to win the estate. *Scott* v. *U. S.*, 115 F. (2d) 137, certiorari denied, 312 U. S. 678. And the government was neutral as to the Bertha Barnett group, full-blood negroes who did not have any Indian blood and who were never connected with any Indian tribe, by record or otherwise. This false claim was supported by an immense amount of perjury, subornation of perjury, and conspiracy to defraud. While making ready to indict these negro claimants for their crimes—and this was done—the United States was still neutral in the civil case. The court found, as to these negroes, that their claims were clearly fictitious and spurious (R. 716).

In the circumstances presented in the *Equitable Trust Company* case the allowances of attorneys' fees and expenses to the litigation were permitted upon two grounds: *First*, because a court of equity, under its power and duty to do equity in accordance with the circumstances of a particular case, will allow successful attorneys fees and expenses out of funds recovered or preserved in the litigation, and *second*, on the further ground that the United States by its attorneys, at least impliedly, agreed that the court should make the allowances.

The need of Respondents' clients for attorneys was far greater than that of Jackson Barnett. In the *Equitable Trust Company* case only two points—one of fact and the other of law—were involved. Neither presented any serious question. Here the hazards arising from the facts

were most serious, and the questions of law were many and very serious. This is shown by the record. One of these Respondents was thoroughly familiar with both cases. He had been employed by the American Baptist Home Mission Society, a defendant in the *Equitable Trust Company* case. He testified (R. 318) that he was prepared to say from personal knowledge of the two cases that there was one hundred times more labor and effort expended by the attorneys in the instant case than by the successful attorneys in the *Equitable Trust Company* case. There was no denial of this fact. It cannot be denied. See findings of fact by the trial court in the supplemental proceedings for fees (R. 52, *et seq.*). In the *Equitable Trust Company* case the consent of the United States to the allowance was perhaps merely by implication, whilst here the consent was in writing and most explicit.

Petitioner erroneously contends that these properties were not in need of preservation or recovery because same were in the custody of the Secretary of the Interior. This is too short a view. To "recover" means to obtain by course in court; to succeed at a trial; *to establish the title* of the true owners, as against other claimants to the property. *Clinchfield Coal Corp.* v. *Steinman*, 213 Fed. (C. C. A. [Va.]) 557, 567; *Gawtry* v. *Adams*, 10 Mo. App. 29; *Hoover* v. *Clark's Admrs.*, 7 N. C. 169, 171; *Keiny* v. *Ingraham*, 66 Barb. (N.Y.) 250; *Pearler* v. *City of Mt. Vernon*, 158 Ill. App. 610; *Norton* v. *Winter*, 1 Ore. 47, 48; *Leslie* v. *York*, 112 Ky. 712, 66 S. W. 751. To the same effect are the definitions of the word "recovery" appearing in all the available standard dictionaries—Black's, Webster's International, Kinney's, Bouvier's, Anderson's, Burrill's. The word "preserve", applied to property rights, means to act timely and effectively; to guard, to shield and protect the right, especially by final decree of the court *declaring the right*. *Reino* v. *Mont. Min-*

eral Land Development Co., 38 Mont. 291, 99 Pac. 853, 855. See also dictionary definitions of the word "preserve".

A property is preserved and recovered by the establishment of the right thereto by court decree, though none of the parties to the litigation have the actual possession of the res.

We contend that the United States ought not to be heard to say that the properties were not in need of preservation, since it clearly appears that Respondents' clients were in desperate need of legal services to prevent an adjudication that their properties belonged to false claimants, and the government committed the matter to Respondents. It is true that Respondents' clients had no worry as to the safekeeping of the properties. Their distress lay in the fact that their right to the property was in grave danger of being lost by a judgment of the court.

In support of the petition for writ of certiorari it is claimed that the court was foreclosed from making the allowances to the attorneys because the properties were restricted. But this contention is squarely overruled in the *Equitable Trust Company* case, where it was said:

> "Counsel for the United States concede the general rule, but regard it as inapplicable here. They assume that Barnett's fund was restricted in the sense that it was not subject to disposal in any form or for any purpose, save with the approval of the Secretary of the Interior; and from this they argue that the court by charging the fund with the costs and expenses and requiring their payment therefrom would be disposing of a part of the fund in violation of applicable restrictions.
>
> "We make the assumption that the restrictions had substantially the same application to the fund that they had to the land from which it was derived, but we think the argument carries them beyond their purpose

and the fair import of their words. Without doubt they were intended to be comprehensive and to afford effective protection to the Indian allottees, but we find no ground for thinking they were intended to restrain courts of equity, when dealing with situations like that disclosed in this litigation, from applying the rules which experience has shown to be essential to the adequate protection of a wronged *cestui que trust* such as Barnett was shown to be."

The above quoted holding was made without reference to Section 3 of the Act of April 12, 1926, which expressly lifted the restrictions, in so far as necessary for the proper functioning of the court.

Here the United States, as custodian of the *res*, submitted it to the orders of the court and then proceeded to give published notice to all adverse claimants who were not personally served, in order for the court to acquire jurisdiction to enter a final judgment determining the ownership of the properties and directing distribution, which would be binding upon all the world. But for the successful services of the Respondents their clients would have lost their right to the properties, together with their right to actual possession. Clearly Respondents both preserved and recovered the properties involved.

In *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 83 L. ed. 1184, there was involved a petition for the allowance of attorneys' fees and litigation expenses, to be charged against funds in the actual possession and control of the Comptroller of the Currency, held by a receiver appointed by and accountable to the Comptroller. The court's control over the funds was merely potential and constructive, rather than actual. The original suit was not for a class, nor to establish by litigation an available fund. In that proceeding Lottie Sprague established her own right to a lien upon

funds held by the receiver. In the supplemental proceeding she based her claim for attorneys' fees and expenses "upon the theory that she had established as a matter of law the right to recovery in relation to fourteen trusts in situations like her own." It was held that, in appropriate situations, allowance of counsel fees and other expenses entailed by litigation not included in the ordinary taxable costs recognized by statutes, is within the equity jurisdiction of the Federal courts. And it was further held that the suits in equity of which Federal courts have been given cognizance by the Judiciary Acts constitute, subject to modifications by Congress, that body of remedies, procedures and practices which, prior to the Declaration of Independence, had been evolved in the English Court of Chancery. The court discussed and applied these rules as follows:

> "To be sure, the usual case is one where through the complainant's efforts a fund is recovered in which others share. Sometimes the complainant avowedly sues for the common interest, while in others his litigation results in a fund for a group, though he did not profess to be their representative. The present case presents a variant of the latter situation. In her main suit the petitioner neither avowed herself to be the representative of a class nor did she automatically establish a fund in which others could participate. But in view of the consequences of *stare decisis*, the petitioner by establishing her claim necessarily established the claims of fourteen other trusts pertaining to the same bonds.
>
> "That the party in a situation like the present neither purported to sue for a class nor formally established by litigation a fund available to the class, does not seem to be a differentiating factor so far as it affects the source of the recognized power of equity to grant reimbursements of the kind for which the petitioner in this case appealed to the chancellor's discretion. Plainly the foundation for the historic practice of

granting reimbursement for the costs of litigation other than the conventional taxable costs is a part of the original authority of the chancellor to do equity in a particular situation."

The doctrine of the *Equitable Trust Company* and *Sprague* cases is a reaffirmation of the principles announced in *Ex parte Plitt*, Fed. Cas. No. 11,228, decided in 1853. This old case was so ably written that it became quite famous. It has been quoted and followed many times, and nowhere do we find, after diligent search, any decision to the contrary. That case arose upon the application of the representative of Daniel Webster, deceased, *et al.*, for fees and expenses for services rendered in an action to determine the heirs and for the distribution of the estate of one Aspden. It appears that the property involved was in the actual possession of the administrator, who was a party to the suit, but his possession was not adverse. No point whatever was made about the actual possession of the property, and it was held that Mr. Webster was entitled to recover his fees and expenses. In the court's statement of the case it was held:

> "The rightful claimant is perhaps the poorest of all, and wholly unable to show his right. Will the court give the fund to any claimant able to make a prima facie case? Or will it make some effort to ascertain the rightful party? It wishes to inform itself; and unless the cost of information is paid by the fund, it will be paid by nobody, and the court will not be rightly informed at all."

And in the opinion it was stated:

> "We have no doubt of the power of the court, where a fund is within its control, as in the case before us, to take care of the rights of the solicitors who have claims against it, whether for their costs, technically speaking, or their reasonable counsel fees."

The doctrine of *Ex parte Plitt* was followed and approved in *Trustees* v. *Greenough*, 15 Otto. 527, 26 L. ed. 1157, and in *Swift* v. *Jackson* (C. C. A. 10), 37 F. (2d) 237.

The rule for which Respondents contend operates regardless of the actual possession of the property involved. It is immaterial whether the estate is held by an administrator, an executor, a trustee, *or any other party*. *Harrison* v. *Moncravie* (C. C. A. 8), 264 Fed. 776.

In *Wallace* v. *Fiske*, 80 F. (2d) 897, the court said:

> "It is next contended in defense that appellant brought no fund into court for remaindermen which could be subjected to the demands of counsel for contribution or otherwise; because, it is pointed out, the property representing the *res* 'was at all times in being, on hand and protected in a place for safe-keeping for the benefit of those interested therein', that is to say, the stock certificates and securities were locked in safe deposit vaults in the city of St. Louis. This contention of appellees seems to beg the question in this respect. This property was in the possession and control of the trustees who rejected the claim of Ehrhardt W. Franz, denied that he had any interest remaining, and refused to give him any information respecting that property and the administration of their trust."

The United States cannot render its Indian wards powerless to protect themselves in litigation. Here they had no resources other than the properties involved. Denial of their right to finance their litigation by the only means available to them would have left them and their counsel helpless and in a *cul de sac*.

4. The Petitioner's cited cases appearing in the petition at pages 11 and 12 are not in point. They are clearly distinguishable from the instant case.

The case of *Minnesota* v. *United States*, 305 U. S. 382, 83 L. ed. 235, was commenced in the state court without making the United States a party. Then there was a purported removal to the Federal Court, but the United States did not become a party in the Federal Court, except to move to dismiss. It was held that the United States was an indispensable party; that the state court did not acquire jurisdiction, and that therefore upon removal to the Federal Court under the general removal statute, the Federal Court had no jurisdiction.

In the case of *United States* v. *Shaw*, 309 U. S. 495, an effort was made to maintain a counterclaim or cross-petition against the United States. It was held this could not be done for want of statutory authority.

In *United States* v. *United States Fidelity Co.*, 309 U. S. 506, the same principle as that involved in the *Shaw* case was applied to a cross-action against the Choctaw and Chickasaw tribes, wards of the United States.

The case of *United States* v. *Hellard*, 322 U. S. 363, followed the Minnesota case, and held void, for want of jurisdiction, a proceeding concerning restricted Indians, in which the United States had not been made a party.

In each of these cases the absence of the United States was the fatal fact.

The cited statement from Cohen's Handbook of Federal Indian Law is unsupported by any authority and is refuted completely by the *Equitable Trust Company* case, discussed *supra*. The other cases cited by Petitioner in support of its theory of limited jurisdiction are clearly so far afield that we deem discussion of them unnecessary.

5. When the United States appears in court to assert a claim it so far takes the position of a private suitor as to agree that justice may be done with regard to the subject matter and all parties concerned in the litigation. Hence in the instant case the United States is bound by the same principles and rules applicable to a private person, and is estopped by conduct and by judgment from now asserting that the court did not have the right to make the allowances.

—*Folk* v. *United States*, 233 F. 191-192;
Luckenbach S. S. Co. v. *Norwegian Barque Thekla*, 266 U. S. 328, 69 L. ed. 313;
United States v. *Debell* (C. C. A. 8), 227 Fed. 775.

The United States had the power to advocate the cause of Respondents' clients. The government having committed their cause to private counsel, stood by for years and saw the Respondents preserve and recover the properties for the true owners. The government, by its authorized representatives, asked the court to make the allowances. The Respondents relied upon the assurances given by the government's own representatives. The United States, when so appearing, should be held to the same standards of fairness and consistency always required of private persons.

6. The authority of the Federal Court to make the allowances complained about was exclusive, regardless of what power the Secretary of the Interior might have had but for the pendency of the government's action.

To say that the Secretary of the Interior had the exclusive authority to make the allowances would be to say that the Secretary, if he so desire, may defeat the court's exercise of its jurisdiction, and defeat the right of Indians to have protection of counsel. We find no statutory authority for the claims made upon behalf of the Secretary. He is a mere

agent of the United States and a trustee in such matter. When the United States submitted the matter to the court, that submission was complete and necessarily exclusive.

It is well settled that in matters of this kind the trial judge is the most suitable person in the world to make such allowances. Even if the Secretary had the power to make these allowances, it would be impractical in the instant case for him to do so. The Congress never intended that he should make allowances in cases of this character. In the circumstances here presented the allowances properly belong within the judicial rather than the administrative field.

Respectfully submitted,

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